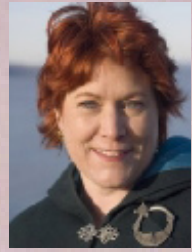


Get Along, Little Dogies:

The Montana Supreme Court Wrangles Down an Art Defamation Suit; Fraudulent Art Owner and His Lawyers Must Pay an Honest Art Authenticator Over \$10 Million in Damages

by **Cindy Ellen Hill, Esq.**



Big skies, big judgment. By a March 12, 2007 ruling of the Montana Supreme Court, art authenticator Steven Seltzer was vindicated of product disparagement. He had issued his honest assessment that a watercolor of two cowboys lassoing a steer on the plains of the American West was not, as claimed by painting owner Steve Morton, the high-priced work of Charles M. Russell, but rather the equally aesthetically pleasing, though considerably less monetarily valuable, work of another Western artist, Olaf C. Seltzer, who happens to be Steven Seltzer's grandfather. Steven Seltzer of Great Plains is the foremost expert on the authentication of his grandfather's work, and is also recognized for his knowledge and authority regarding Russell's works. Russell and O.C. Seltzer were contemporaries and friends who painted together, sketching similar subject matter, though with different palettes and forms, in the early 20th century.

While the reported case is voluminous (read it [here](#)), in a nutshell, Steve Morton bought from a gallery a painting which was marketed as a Russell. He took no pains upon his purchase to authenticate it as such. Morton later took the work to the Coeur d'Alene Art Auction for sale. When one of the co-owners showed the work to his partner, the partner immediately responded to the effect that, "That's not a Russell, that's a Seltzer." The first partner, not wanting to offer the work with an erroneous attribution, sent it off to Steven Seltzer for authentication.

Examination of the watercolor showed

that, while it bore an inked signature and trademark icon of Russell, the style and palette were apparently clearly that of Seltzer, right down to the subject bull being the same one as appeared in a number of other Seltzer paintings. Not only that, but the documented history of the work's ownership showed that it had mysteriously shrunk by four inches in length and four inches in height somewhere along the way. (Had the case ever gone to jury trial, I suspect a trial attorney in closing argument would have raised the implication that Seltzer's signature, along with two four-inch strips of the work, had simply been lopped off with a paper cutter.)

The art auction turned back the painting. Steve Morton sought another opinion, this time by Ginger Renner, foremost expert on Russell and lesser expert on Seltzer. Her opinion echoed Steven Seltzer's to a T.

ART DISPARAGEMENT

Morton, instead of accepting that he had a doctored-over Seltzer worth perhaps a few thousands or tens of thousands of dollars, no doubt smarting because he'd paid for the work as a Russell without bothering to check properly on the authentication first, demanded that Steven Seltzer withdraw his honest opinion that the work was of Olaf C. Seltzer, and write a new opinion stating the work was by Russell. When Seltzer nobly and ethically declined, Morton sued, claiming "art disparagement."

Product disparagement is a kind of law called a "common-law tort." That is, it's a

law of fairness that has evolved through court decisions rather than a statute written in a law book. This particular common-law tort of product disparagement is defined as meaning, according to *Black's Law Dictionary*, "A false and injurious statement that discredits or detracts from the reputation of another's property, product, or business. To recover in tort for disparagement, the plaintiff must prove that the statement caused a third party to take some action resulting in specific pecuniary loss to the plaintiff."

When someone makes a false, harmful statement against a person, it is called either defamation, or slander, or libel, depending on the circumstances. Disparagement is when similar false, harmful statements are made about a product. But the person who claims their product has been disparaged must also demonstrate that actual monetary damages – pecuniary loss – resulted from the disparaging statements.

Most of the lawsuits regarding product disparagement have been, oddly enough, in the field of food products. This is when one of those rumors gets started that some brand of hot dogs has rat parts in it, or when someone falsely claims to have found a bug (or worse) in a fast food meal. One key element here is *falsely* – the recent claims against Kraft Foods that their Oreo cookies contained harmful trans fats, for example, were not false at all – and to their credit, once suit was filed on that point, Kraft immediately changed their whole product manufacturing process and took the trans fats out, so go ahead and eat those Oreos. But Kraft could not have sued the non-profit consumer group that raised the criticism for product disparagement, because the claim was true. But if someone claimed Oreos contain whales' tails, and if Kraft then saw a marked drop in sales after that rumor was launched, they'd be in their rights to sue for product disparagement (as long as whales' tails really are entirely absent from Oreos).

In the last ten to twenty years, there has been an increase in the number of people filing lawsuits extending the common law tort of product disparagement to the field of art. The theory would be that if someone falsely and publicly claims that an artwork is not an original by a high-money artist, thereby making it difficult for the owner to sell the work for the big dollars they had otherwise anticipated, the person making the claim can be sued for Art Disparagement.

THIS SNAKE BITES BACK

Art authenticators, museums, galleries and universities are presently in a state of upheaval over this, frightened to issue honest, well-supported opinions for fear that they will get sued. But here is the very, very interesting catch: while numerous people have filed lawsuits against authenticators and experts, claiming art disparagement for their statements of honest opinion that the work was not really a Rembrandt or Pollock or, in this case, Russell, no one has ever actually won such a suit. In fact, assuming that the authenticator and expert knows their stuff, are duly qualified in the field in which they are rendering an opinion, and factually support that opinion, a claim of art disparagement is more likely to do exactly what it did in this case: snap back

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A painting by Charles M. Russell

Seltzer sued and bite the money-seeking art owner like a rattlesnake.

back for Morton sued without first finding his own independent fully court-expert-qualified

malicious witness to attest that the work was truly that of Russell. And then he refused to disclose in

prosecution discovery that Ginger Renner had confirmed Seltzer's opinion. As is the case with most

and was of these suits, assuming they don't settle out earlier, the trial court dismissed the case on

awarded Seltzer's motion for summary judgment – a motion that the defendant brings early in the

case asking the judge to find that there is no way the plaintiff, in this case Morton, could

\$9.9 million. support his legal claim of art disparagement. Although the suit was thrown out relatively

early on, Seltzer was still out \$45,000 in lawyers fees as well as his time. Being the

subject of a lawsuit – even a groundless, senseless one that gets dismissed rather

quickly – is stressful, time-consuming and costly. So, in this case, Seltzer sued back for

malicious prosecution. He sued both the art owner and his attorneys, who the court

found had been aware before they filed suit that they did not have the proper experts

and sufficient facts lined up to support their own claims. They'd just sued because they

counted on Seltzer folding up in the face of their weighty letterhead and big-money

claims. To his credit – like some independent rancher standing up to the corporate

heavyweights in a classic Western flick of old – he did not do so.

Seltzer's suit went to trial, and the jury awarded him over \$1 million in

compensatory damages and more than \$20 million in punitive damages. The appeals

court reduced the punitive damages to \$9.9 million. The bottom line is that Morton's

attempt to make this honest authenticator issue a lie of an opinion so that he could gain

a few hundred thousand dollars at auction just cost him and his lawyers the ranch.

LESSONS LEARNED: TIPS FOR ART OWNERS, SELLERS AND AUTHENTICATORS

As Morton rides off into the sunset with his ill-fated O.C.Seltzer watercolor, we can reflect on the lessons learned.

First, if a duly qualified art expert or authenticator issues a well-founded,

reasonably researched, honestly supported opinion regarding the authenticity of an

artwork, he or she cannot be found liable in a court of law for art product disparagement.

That tort is only available when the opinion issued is false, or so recklessly formed that

the authenticator should have known it was false or unsupportable. Had Steven

Seltzer given in to Morton's demands and knowingly issued a false statement as to the

work's origins, he might have been liable to the auction house and the next owner for

fraud. He knew his stuff and did his job. That being the case, a suit against him could not

prevail.

Secondly, galleries, auction houses and art brokers ought to include in their consignment

contracts a clause that clearly says they can seek authentication and expert opinions

regarding the work being consigned. If the owner refuses, then it's quite simple: don't

take the work for sale. This doesn't mean that a gallery, auction house or broker need go

through the time and expense of independent authentication in all cases, and if the owner



A painting by Olaf C. Seltzer

produces satisfactory documentation and the gallery, auction house or broker is happy with the owner's representations, by all means, present the work for sale on that basis. But if an owner refuses to allow independent inspection (for any reason other than concerns about, for example, potentially destructive testing or damage that might occur in shipping, the liability for which should also be addressed in the consignment contract), then I think there is good reason to question just how strongly the owner really believes their own representations about the work. Now, you could say, "The owner says it's a Rembrandt and I want to just take it in with my eyes closed and sell it as a Rembrandt because I'll make boatloads of money." Nice, until the next owner figures out it's not a Rembrandt, and you're the guy who said it was. Bad position to be in. You'll make more money in the long run with a good honest reputation for seeking truth about the art you're representing than you will in a short-term turn-around of a questionable work. Just look at Steven Seltzer – good guys do prevail if they hang tough and true. Hey, who always wins in the end in those Western flicks, anyway?

Thirdly, if you're an art authenticator or other art expert, play it clean. Make sure that you offer opinions only in fields you are duly qualified to work within. Enter into a simple, clean, easy-to-understand contract with anyone who brings a work to you for authentication, making it clear to the person what you will do in your authentication process, and that your opinion will be based solely on your research, examination and experience in the field, and that your opinion will either name the artist you believe originated the work or will explain why you cannot reach a definitive conclusion. Also include a means of referring the work for additional testing if you believe it necessary. And two other important points: ensure that the person bringing the work to you for authentication has the authority to do so. A broker or gallery might not be authorized to

bring a work to you for examination. Tattoo parlors don't tattoo minors without their parents present, and similarly you shouldn't be poking at an art owner's "baby" without the art owner's permission, unless the gallery or broker has a clear contract authorizing them to seek independent evaluation. And I'd suggest including in your contract a clear statement to the effect that you may publish your opinion together with your photographs of the work if you choose to do so. If the art owner refuses to accept these terms, then it's quite simple: don't evaluate the work. Harsh, maybe, but you'll benefit in the long run. You need to be able to publish your works in order to promote your own expertise, reputation and business. And if you find a work to be, say, a Seltzer rather than a Russell, but are bound to silence, then five years later the piece comes back to you having been falsely sold as a Russell in the meantime – bad position to be in.

So if art sellers – galleries, auction houses, brokers – demand the authorization to have independent evaluation of the works they sell, and if authenticators demand the authorization to disclose their findings, what would happen?

Of course, it doesn't mean the authenticators would always agree. Surely there will always be some artworks on which either a definitive answer is not possible, and there will be other cases where an honest authenticator is simply mistaken and makes the wrong call. There is human frailty in the world – and thank goodness for it, as it underlies the roots of some of humankind's most glorious and creative works. If works are sent out for authentication and those authentications are published, other experts can contact the authenticator and owner with questions or concerns about the opinion, and differences of opinion or errors can be pointed out and resolved through transparency and peer review. We would all be much closer to the pursuit of truth in art. And on that point, little dogies, we can all get along quite nicely. 🐾

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